

No. 14825

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United States  
Court of Appeals  
for the Ninth Circuit

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GLEN T. JAMISON, Director of Internal  
Revenue, Appellant,

vs.

MARIA REPETTI, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the Northern  
District of California, Southern Division

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK



No. 14825

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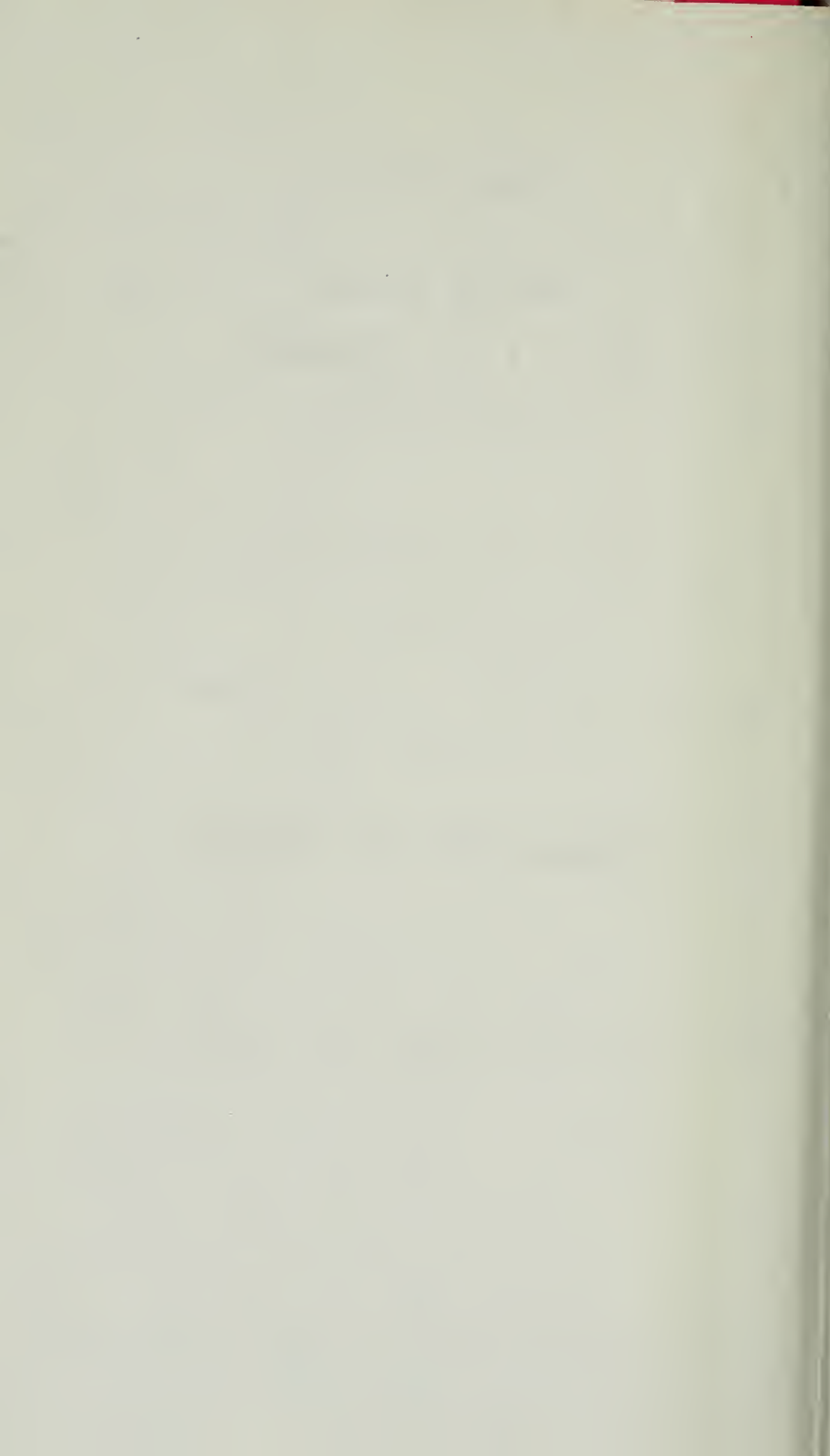
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Appeal from the United States District Court for the Northern  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

Civil No. 33161

MARIA REPETTI, Plaintiff,  
vs.

GLEN T. JAMISON, Director of Internal Revenue, Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF  
I.

This Action is brought under Title 26 United States Code, Section 272(a)(1).

II.

The Plaintiff, Maria Repetti, is a citizen of the United States and a resident of Stockton, California. The Plaintiff and her husband, A. Repetti, filed a joint income tax return for the calendar year 1948 at the Office of the Collector of Internal Revenue for the First Collection District of Northern California at Stockton, California. A. Repetti died during the year 1950.

III.

On or about the twelfth day of December, 1952, the Defendant, Glen T. Jamison, acting through his agents, servants or employees, served or caused to be served on the Plaintiff, a notice which purported to be a Notice of Mathematical Error in compliance with Section 272(f) of Title 26 of the United States Code, when in truth and fact the alleged deficiencies asserted arise as a result of an interpretation of the

provisions of the Internal Revenue Code (see Exhibit A.).

#### IV.

On or about the thirtieth day of January, 1953, the Defendant Glen T. Jamison, acting through his agents, servants or employees, levied an assessment against the Plaintiff in the amount of Two Hundred Sixty and 48/100 Dollars (\$260.48) and threatened, and have threatened, and do threaten to distrain the Plaintiff's property in satisfaction of said assessment, when in truth and in fact the Plaintiff did not and does not owe the United States of America the sum of Two Hundred Sixty and 48/100 Dollars (\$260.48) for income taxes, penalties, or interest for the calendar year 1948, or any other sum of money as income taxes, penalties or interest for the calendar year 1948.

#### V.

The Plaintiff has no adequate remedy at law and will suffer great and irreparable harm and injury if the Defendant, his agents, servants or employees carry out their threats.

Wherefore, the Plaintiff prays that this Court enjoin the Defendant, his agents, servants and employees from:

1. From taking any action whatsoever to distrain the Plaintiff's property pursuant to the assessment of January 30, 1953.
2. This Court order the assessment of January 30, 1953 removed from the assessment list.

3. Such other and further relief as the Court deems just and proper in the circumstances.

### Second Cause of Action

For a further separate and distinct Cause of Action, the Plaintiff alleges as follows:

#### I.

This Action is brought under Title 26 United States Code, Section 272(a)(1).

#### II.

The Plaintiff, Maria Repetti, is a citizen of the United States and a resident of Stockton, California. The Plaintiff and her husband, A. Repetti, filed a joint income tax return for the calendar year 1949 at the Office of the Collector of Internal Revenue for the First Collection District of Northern California at Stockton, California. A. Repetti died during the year 1950.

#### III.

On or about the twelfth day of December, 1952, the Defendant, Glen T. Jamison, acting through his agents, servants or employees, served or caused to be served on the Plaintiff, a notice which purported to be a Notice of Mathematical Error in compliance with Section 272(f) of Title 26 of the United States Code, when in truth and fact the alleged deficiencies asserted arise as a result of an interpretation of the provisions of the Internal Revenue Code (see Exhibit B).

## IV.

On or about the thirtieth day of January, 1953, the Defendant Glen T. Jamison, acting through his agents, servants or employees, levied an assessment against the Plaintiff in the amount of One Hundred Thirty Two and 97/100 Dollars (\$132.97) and threatened, and have threatened, and do threaten to distrain the Plaintiff's property in satisfaction of said assessment, when in truth and in fact the Plaintiff did not and does not owe the United States of America the sum of One Hundred Thirty Two and 97/100 Dollars (\$132.97) for income taxes, penalties, or interest for the calendar year 1949, or any other sum of money as income taxes, penalties or interest for the calendar year 1949.

## V.

The Plaintiff has no adequate remedy at law and will suffer great and irreparable harm and injury if the Defendant, his agents, servants or employees carry out their threats.

Wherefore, the Plaintiff prays that this Court enjoin the Defendant, his agents, servants and employees from:

1. From taking any action whatsoever to distrain the Plaintiff's property pursuant to the assessment of January 30, 1953.

2. This Court order the assessment of January 30, 1953 removed from the assessment list.

3. Such other and further relief as the Court deems just and proper in the circumstances.

SEAMAN & DICK,  
/s/ By WAREHAM SEAMAN

Duly Verified.

EXHIBIT "A"

[Seal]

Copy

U. S. Treasury Department, Office of the Director  
of Internal Revenue, 100 McAllister St. Bldg.,  
San Francisco 2, Calif.

Internal Revenue Service  
First District of California

Dec. 15, 1952

In Replying refer to: CD: Room 823 Group 1:Gilbert:fh Serial No. 52 Dec. 290417-48 Tax Supplement No.

A. & Maria Repetti,  
P.O. Box 562, Stockton, California

A mathematical verification of the items on the Federal Income Tax Return filed by you for the calendar year 1948 discloses errors which result in an increase of tax of \$176.00, plus \$44.00 penalty and \$40.48 interest.

Your return has Not Been Audited. If, as a result of a later intensive audit it develops that additional information is necessary or further corrections must be made, you will be duly advised.

The mathematical errors are:

The statutory period has expired for allowed credit taken on this return.

Page 1 line 8 balance of tax due.....	\$176.00
Delinquency penalty is due at the rate of 5% per 30-day period or fraction thereof not to exceed 25% in the aggregate. Penalty on \$176.00 at 25% is.....	44.00
Interest is due at 6% per annum on \$176.00 from 3-15-49 to 1-15-53 or .....	40.48
	<hr/>
Amount due.....	\$260.48

Line 8 Balance of tax: As Filed: None. As Corrected: \$176.00

Immediate assessment of the increase in tax will be made in accordance with the provisions of Section 272(f) of the Internal Revenue Code. It will be appreciated if you will return a copy of this letter with your remittance in the amount indicated hereon to obviate the issuance of a formal notice and demand.

Very truly yours,

/s/ Glen T. Jamison, Director

### EXHIBIT "B"

[Seal]

Copy

U. S. Treasury Department, Office of the Director  
of Internal Revenue, 100 McAllister St. Bldg.,  
San Francisco 2, Calif.

Internal Revenue Service  
First District of California

Dec. 12, 1952

In Replying refer to: CD: Room 823 Group 1:Gilbert:fh Serial No. 52 Dec. 200524-49 Tax Supplemental No.



A. & Maria Repetti

P.O. Box 562, Stockton, California

A mathematical verification of the items on the Federal Income Tax Return filed by you for the calendar year 1949 discloses errors which result in an increase of tax of \$94.00, plus \$25.00 penalty, and \$13.97 interest.

Your return has Not Been audited. If, as a result of a later intensive audit it develops that additional information is necessary or further corrections must be made, you will be duly advised.

The mathematical errors are:

As the statutory period for allowing credit of \$94.00 has expired it cannot be allowed:

Page 1 line 9 (instead of \$218.00).....	\$312.00
Delinquency penalty is due at the rate of 5% per 30-day period or fraction thereof not to exceed 25% in the aggregate. Penalty on \$312.00 (instead of \$53.00) is at 25% .....	78.00
Interest is due at 6% per annum on \$305.88 from 3-15-50 to 10-23-52 .....	\$47.81
\$6.12 from 3-15-50 to 1-15-53.....	1.04
	\$438.85
Amount received with return	305.88
	Amount due \$132.97
Interest computed above .....	\$ 48.85
Interest computed on return.....	34.88
	Interest increase .....
	\$ 13.97

Immediate assessment of the increase in tax will be made in accordance with the provisions of Section 272(f) of the Internal Revenue Code. It will

be appreciated if you will return a copy of this letter with your remittance in the amount indicated hereon to obviate the issuance of a formal notice and demand.

Very truly yours,

/s/ Glen T. Jamison, Director

[Endorsed]: Filed November 5, 1953.

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[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Upon reading and filing of the verified Complaint in this Action, and the Affidavit of Plaintiff in support thereof, and Good Cause appearing therefore; it is hereby ordered that the Defendant Glen T. Jamison appear and show cause on the 13th day of November, 1953 at 10 o'clock a.m. of said day in Room 258, United States Post Office Building, Seventh and Mission Streets, San Francisco, California, or as soon thereafter as Counsel may be heard why they should not be enjoined during the pendency of this action from any distraint or other action from collecting asserted income taxes, penalties and interest due the Defendant by the Plaintiff.

It is further ordered that a copy of the Complaint and Affidavit of Plaintiff, Maria Repetti, if they have not already been served, be served with this Order on said Defendant at least five (5) days before the time fixed herein for showing cause.



Dated this 5th day of November, 1953.

/s/ LOUIS E. GOODMAN,  
United States District Judge

[Endorsed]: Filed November 5, 1953.

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[Title of District Court and Cause.]

### MOTION TO DISMISS AND NOTICE

The defendant, Glen T. Jamison, Director of Internal Revenue, by Lloyd H. Burke, United States Attorney for the Northern District of California, his attorney, moves to dismiss this action upon the ground that this Court is without jurisdiction thereof because this action is brought to restrain the collection of Internal Revenue taxes, the maintenance of which is prohibited by Section 3653 of the Internal Revenue Code, and because the complaint fails to state a claim against defendant upon which relief can be granted.

#### Notice

To the Plaintiff, Maria Repetti, and to her attorneys, Seaman & Dick, J. B. O'Grady, 503 California Bldg., Stockton, Calif.:

Please Take Notice that the defendant, Glen T. Jamison, Director of Internal Revenue, will on Monday, March 8, 1954, at the hour of 10:00 o'clock a.m., in the courtroom of United States District Judge Michael J. Roche, in Room 338 in the Post Office Building, Seventh and Mission Streets, San

Francisco, California, move the above entitled court to hear the foregoing Motion to Dismiss.

Dated: This 26th day of February, 1954.

LLOYD H. BURKE,

United States Attorney

/s/ By CHARLES ELMER COLLETT,

Asst. United States Attorney

/s/ DAN S. MORRISON,

Acting Associate Civil Advisory Counsel, Internal Revenue Service.

Acknowledgment of Service attached.

[Endorsed]: Filed February 26, 1954.

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[Title of District Court and Cause.]

### ORDER DENYING MOTION TO DISMISS

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that the motion to dismiss be, and the same hereby is, Denied without prejudice to defendant's renewing said motion before the trial court at the time the evidence has been submitted.

Dated: April 6, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge

26 U.S.C.A. 271(a)(1);

Maxwell vs. Campbell, 205 F.2d 461;

F.R.C.P. 65.

[Endorsed]: Filed April 7, 1954.

[Title of District Court and Cause.]

ANSWER OF THE UNITED STATES OF  
AMERICA

Glen T. Jamison, Director of Internal Revenue, the defendant above-named, by Lloyd H. Burke, United States Attorney for the Northern District of California, George A. Blackstone, Assistant United States Attorney for said District, and Dan S. Morrison, Attorney, Office of the Regional Counsel, Internal Revenue Service, his attorneys, respectively allege and show:

To the First Cause of Action

1. Denies the allegations contained in paragraph I of the complaint.
2. Admits each and every allegation contained in paragraph II of the complaint.
3. Denies each and every allegation contained in paragraph III of the complaint except he admits that on or about the 12th day of December, 1952, he served on the plaintiff and her husband, A. Repetti, Notice of Mathematical Error under Section 272(f) of the Internal Revenue Code with respect to the income tax return of the plaintiff and her husband for 1948.
4. Denies each and every allegation contained in paragraph IV of the complaint, except he admits that an assessment was made against the plaintiff in the amount of \$260.48; alleges that said assessment was made on December 12, 1953.

5. Denies each and every allegation contained in paragraph V of the complaint.

To the Second Cause of Action

1. Denies the allegations contained in paragraph I of the complaint.

2. Admits each and every allegation contained in paragraph II of the complaint.

3. Denies each and every allegation contained in paragraph III of the complaint except he admits that on or about the 12th day of December, 1952, he served on plaintiff a Notice of Mathematical Error under Section 272(f) of the Internal Revenue Code with respect to the income tax return of the plaintiff and her husband for the year 1949.

4. Denies each and every allegation contained in paragraph IV of the complaint except he admits that an assessment was made against the plaintiff; alleges that said assessment was made on December 12, 1953, and was in the amount of \$312.00 plus \$78.00 penalty and \$48.85 interest, and that payments of \$305.88 have been made, leaving a balance due of \$132.97.

5. Denies each and every allegation contained in paragraph V of the complaint.

For a Complete Defense to the First and Second Causes of Action Alleged in the Complaint

1. That this Court is without jurisdiction of this action because it is a suit to restrain the collection of internal revenue taxes the maintenance of which

is prohibited by Section 3653(a) of the Internal Revenue Code.

LLOYD H. BURKE,

United States Attorney

/s/ By GEORGE A. BLACKSTONE,

Asst. United States Attorney

/s/ DAN S. MORRISON,

Attorney, Office of the Regional Counsel, Internal Revenue Service.

Acknowledgment of Service attached.

[Endorsed]: Filed July 29, 1954.

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[Title of District Court and Cause.]

### NOTICE OF MOTION FOR SUMMARY JUDGMENT

Please take notice that upon annexed Affidavit of Wareham C. Seaman, duly sworn to November 17th, 1954, and upon the pleadings herein, the exhibits annexed thereto and all the proceedings heretofore had herein, the undersigned will move this Court, at Room 244 of the United States Courthouse, Post Office Building, 7th and Mission Streets, San Francisco, California, on the 29 day of November, 1954, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order under Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment in favor of the Plaintiff upon all of the grounds as set forth in the moving papers herein and for such other and dif-

ferent relief as to the Court may seem just and proper in the premises.

Dated: November 17, 1954.

/s/ WAREHAM C. SEAMAN,  
Attorney for Plaintiff

### MOTION FOR SUMMARY JUDGMENT

The plaintiff, Maria Repetti, by Wareham C. Seaman, her attorney, hereby moves the Court to enter Summary Judgment for the plaintiff, in accordance with the provisions of Rule 56 of the Rules of Civil Procedure, on the ground that the Pleadings and Affidavit hereto attached, and marked Exhibit "A", show that plaintiff is entitled to judgment as a matter of law.

/s/ WAREHAM C. SEAMAN,  
Attorney for Plaintiff

### EXHIBIT "A"

#### Affidavit in Support of Motion for Summary Judgment

State of California,  
County of San Joaquin—ss.

Wareham C. Seaman, being first duly sworn, deposes and says:

I am the attorney for the Plaintiff, and have personal knowledge of all the facts herein set forth.

This affidavit is submitted in support of the Plaintiff's Motion for Summary Judgment herein,



for the purpose of showing that there is in this action no genuine issue as to any material fact, and that the Plaintiff is entitled to judgment as a matter of law.

The facts within affiant's personal knowledge in support of the Motion for Summary Judgment are as follows:

Maria Repetti and A. Repetti were husband and wife residing in the City of Stockton, State of California. Within the period provided by law, Maria and A. Repetti filed a Joint Declaration of Estimated Tax for the calendar year 1945 and paid to Defendant thereon the sum of Two Hundred Ninety-Six (\$296.00) Dollars. No personal income tax returns were filed by Maria Repetti or A. Repetti during the calendar years 1944 to 1951, both inclusive, until October 23, 1952;

That A. Repetti died during the calendar year 1950;

That the Plaintiff took credit for the tax paid on the 1945 Declaration of Estimated Tax on the final returns filed by the Plaintiff as follows: 1. Calendar year 1946, \$26.00; 2. Calendar year 1948, \$176.00; and 3. Calendar year 1949, \$94.00.

That on December 15, 1952, Defendant mailed to Plaintiff a notice of mathematical error disallowing said credit in the sum of One Hundred Seventy-Six (\$176.00) Dollars for the calendar year, 1948, and a credit in the sum of Ninety-Four (\$94.00) Dollars for the calendar year, 1949.

That no notice of deficiency was mailed to the Plaintiff by registered mail as provided by Section 272(a)(1).

There are no mathematical errors on the returns filed by Plaintiff for the calendar years 1948 and 1949 entitling the Defendant to collect the tax alleged to be due under the provisions of Section 272(f) of the Internal Revenue Code.

Defendant has filed liens against the Plaintiff.

There exists no genuine issue as to any material fact and Plaintiff is entitled to Summary Judgment as a matter of law.

/s/ WAREHAM C. SEAMAN

Subscribed and sworn to before me this 17th day of November, 1954.

[Seal] /s/ GENE E. MANSHILDOR,  
Notary Public in and for the County of San Joaquin, State of California.

[Endorsed]: Filed November 19, 1954.

[Title of District Court and Cause.]

## NOTICE OF MOTION FOR SUMMARY

### JUDGMENT

Please take notice that upon the attached affidavit of Wayne L. Prim, duly sworn to November 24, 1954, and upon the pleadings herein and all the proceedings heretofore had herein, the undersigned



will move this Court, at Room 244 of the United States Courthouse, Post Office Building, 7th and Mission Streets, San Francisco, California, on the 29th day of November, 1954, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order under Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment in favor of the defendant upon all the grounds as set forth in the various pleadings and documents herein and for such other and different relief as to the Court may seem just and proper in the premises.

Dated: November 24, 1954.

LLOYD H. BURKE,  
United States Attorney

/s/ By CHARLES ELMER COLLETT,  
Asst. United States Attorney

/s/ WAYNE L. PRIM,  
Attorney, Office of Regional Counsel, Internal Revenue Service.

#### MOTION FOR SUMMARY JUDGMENT

The defendant, Glen T. Jamison, Director of Internal Revenue, by Lloyd H. Burke, United States Attorney for the Northern District of California, his attorney, hereby moves the Court to enter a Summary Judgment for the defendant in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings and affidavit hereto attached, and marked

Exhibit "A", show that defendant is entitled to judgment as a matter of law.

/s/ LLOYD H. BURKE,

United States Attorney

/s/ By CHARLES ELMER COLLETT,

Asst. United States Attorney

[Seal] /s/ WAYNE L. PRIM,

Attorney, Office of the Regional Counsel, Internal Revenue Service.

### EXHIBIT "A"

#### Affidavit in Support of Motion for Summary Judgment

State of California,

City and County of San Francisco—ss.

Wayne L. Prim, being first duly sworn, deposes and says:

I am an attorney, Regional Counsel's Office, Internal Revenue Service, and have personal knowledge of all the facts herein set forth.

The files and records of the Internal Revenue Service relating to the above-entitled matter disclose the following:

Taxpayers A. Repetti and Maria Repetti on October 23, 1952, filed joint income tax returns for the calendar years 1948 and 1949. The return for the year 1948 indicated that there was a total tax due of \$176.00. Attached to the face of the return and made a part of the return was a note reading as follows: "Tax \$176, less: Overpayment due to pay-

ment on 1945 estimated tax declaration, Block No. 1576, \$176.00—due none.”

On the return for the year 1949, taxpayers indicated an income tax due of \$312.00. Attached to the face thereof and made a part of the return was a note reading as follows: “Tax \$312.00 less: Overpayment due to 1945 declaration estimated tax payment (block No. 1676) \$94.00, balance of tax \$218.00, 25% penalty \$53.00, interest at 6% to November 15, 1952, \$34.88, total \$305.88.”

Plaintiff and her husband never filed any claim for refund or credit of their 1945 estimated tax payments other than that which was made by filing on October 23, 1952, the delinquent joint income tax returns for the calendar years 1948 and 1949 as stated above.

/s/ WAYNE L. PRIM

Subscribed and sworn to before me this 24 day of November, 1954.

[Seal] /s/ MARGARET P. BLAIR,  
Deputy Clerk, U. S. District Court, Northern District of California.

Acknowledgment of Service attached.

[Endorsed]: Filed November 24, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33161

MARIA REPETTI,

Plaintiff,

vs.

GLEN T. JAMISON, Director of Internal Revenue,  
Defendant.

### MEMORANDUM AND ORDER

Plaintiff instituted this action under 26 U.S.C. §272(a)(1) to restrain the assessment of income taxes claimed by defendant to be due to the Government. The section under which plaintiff proceeds provides as follows:

“If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed \* \* \* the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the

provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

Defendant resists plaintiff's demand for an injunction, claiming that the alleged deficiency in plaintiff's return was the result of mathematical error, and therefore falls within 26 U.S.C. §272(f) which contains an exception to Section 272 (a)(1). It provides in part:

"If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered \* \* \* as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section."

The facts which gave rise to this dispute are set forth in the pleadings, and both parties have moved for summary judgment. Plaintiff (and plaintiff's now deceased husband) filed a declaration of estimated tax for the year 1945, and paid \$296 as the tax estimated for that year; but part of the \$296 was in fact an overpayment. In 1952 plaintiff filed returns for the years from 1944 through 1949 in-



elusive. The returns for 1948 and 1949 indicated some tax liability for those years but plaintiff claimed as a credit against that liability the amount paid as an overpayment on the 1945 declaration of estimated tax. In December of 1952 the Director of Internal Revenue issued a Notice of Mathematical Error pursuant to 26 U.S.C. §272(f). The notice stated that the error consisted of claiming a credit with respect to which the statutory period for allowance had expired.

A search of the authorities has not revealed a judicial construction of the term "mathematical error"; but it is the opinion of this Court that the term as used in the statute in question was meant to refer to errors in arithmetic. This opinion is based primarily on the common meaning given to the phrase "mathematical error," and also on the fact that Congress did not provide for a petition by the taxpayer to the Board of Tax Appeals in the case of such error. It would appear that the failure to provide for review of a determination of mathematical error was due to the fact that there can be no dispute as to a matter of arithmetical computation.

The alleged error of the plaintiff was not a mistake in arithmetic or an inadvertent entry, and therefore it was not a mathematical error within the meaning of 26 U.S.C. §272(f). Thus the Notice of Mathematical Error issued to plaintiff was ineffective as such, and plaintiff is entitled to the relief prayed for. It is not necessary for this Court to decide whether or not the credit claimed by

plaintiff was barred by statute, because the purpose of the injunction referred to in Section 272(a) is to provide for an administrative review of a determination of deficiency. This was emphatically stated in *Ventura Oil Fields vs. Rogan*, 9th Cir., 86 F.2d 149, 154-155:

“The injunction of section 274(a) (now section 272(a)) is provided for the specific purpose of assuring taxpayer that a claimed deficiency shall be determined by the administrative process and adjudication by the Board of Tax Appeals provided by the statute. It must be granted without condition. The Commissioner, by failing to perform his administrative duty, cannot deprive taxpayer of his statutory right and convert the special injunctive proceeding into a judicial determination of the tax.”

Accordingly, It Is Ordered that the motion of plaintiff Maria Repetti for summary judgment be, and the same is hereby granted. The assessment of January 30, 1953 is hereby ordered to be removed from the assessment list, and defendant Glen T. Jamison, Director of Internal Revenue, his agents, servants and employees are hereby enjoined from taking any action to distrain plaintiff's property pursuant to the assessment of January 30, 1953.

Dated: February 2, 1955.

/s/ OLIVER J. CARTER,

United States District Judge

[Endorsed]: Filed February 4, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR REHEARING

To: Wareham C. Seaman, Attorney for Plaintiff,  
33 East Magnolia St., Stockton, Calif.:

Please take notice that the undersigned will move this Court, at Room 244 of the United States Courthouse, Post Office Building, 7th and Mission Streets, San Francisco, California, on the 21st day of February, 1955, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, to rehear the matter of Summary Judgment herein and to vacate the order entered February 2, 1955, and for such other and different relief as stated in the attached motion.

Dated: February 11, 1955.

LLOYD H. BURKE,

United States Attorney

/s/ By CHARLES ELMER COLLETT,

Asst. United States Attorney

/s/ WAYNE L. PRIM,

Attorney, Office of Regional Counsel, Internal Revenue Service.

MOTION FOR RECONSIDERATION OR  
REHEARING

Comes now the defendant, Glen T. Jamison, Director of Internal Revenue, by Lloyd H. Burke, United States Attorney for the Northern District of California, his attorney, and



Moves that a rehearing be granted in the above entitled case for the following reasons and upon the following grounds:

On February 2, 1955, this Court entered an order granting the plaintiff an injunction restraining the assessment and collection of taxes alleged to be due the United States. The Court in its memorandum of the law based the injunction on the conclusion that the error involved was not a mistake in arithmetic or an inadvertent entry and hence was not a mathematical error within the meaning of section 272(f), 1939 Internal Revenue Code. It therefore concluded that the notice as such was ineffective. No discussion was made as to the existence or non-existence of a "deficiency" as required for the application of section 272(a), 1939 Internal Revenue Code, authorizing an injunction.

It is respectfully submitted that assuming, arguendo, the Court's finding that the notice of mathematical error was defective is correct, this in itself does not give rise to a basis for an injunction. The restraining of assessments or collection of any tax is specifically prohibited in no uncertain terms by section 3653(a) of the 1939 Internal Revenue Code. That section creates an exception to this broad prohibition only when section 272(a), supra, applies. Nowhere in the exception is there authority for granting an injunction upon a mere finding that a notice under section 272(f), supra, was defective.

Section 272(a), Internal Revenue Code, supra, the provision authorizing an injunction, is clearly dependent for its operation upon the existence of a

“deficiency”. As was discussed in defendant’s original brief, section 271(b)(1), 1939 Internal Revenue Code, specifically excludes from the determination of a deficiency any credits based on payments on account of estimated tax. Here the parties are in complete agreement that the only item in controversy and with reference to which the notice was sent was a credit based on a payment on account of estimated tax. Therefore, the conclusion is inescapable that no “deficiency” exists under section 272 (a), 1939 Internal Revenue Code, *supra*, and accordingly no injunction is authorized.

The issuance of a “90 day letter” is required only in those situations involving “deficiencies” in income, estate and gift tax. Absent a deficiency in a given case the Commissioner is authorized under the general assessment authority provided in section 3640, 1939 Internal Revenue Code, to make an assessment immediately without issuing any 90 day letter.

Any doubts that may have existed as to the proper method to be followed in collection of tax arising by reason of a dispute over the allowance of a credit based on a payment made in reference to estimated tax have been completely eliminated by the language of the 1954 Internal Revenue Code. Section 6201 (1954 Internal Revenue Code) provides as follows:

Chapter Assessment

\* \* \* \* \*

Subchapter A—In General

\* \* \* \* \*

Sec. 6201. Assessment Authority.

(a) Authority of Secretary or Delegate.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

\* \* \* \* \*

(3) Erroneous Income Tax Prepayment Credits.—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

Although the taxes in this proceeding accrued under a former Internal Revenue Law (1939 Code), they are clearly covered as the above section expressly provides. Subsection 6201(a)(3), 1954 Internal Revenue Code, *supra*, directs that assess-

ments made in connection with payments on estimated tax be assessed in the same manner as in the case of a mathematical error appearing upon the return.

In the event the Court should deny defendant's motion, it is requested of the Court that a further clarification of the order be made. As defendant interprets the order it applies only to the assessment of January 30, 1953, and therefore does not restrain the Director from making a new assessment pursuant to section 6201 of the 1954 Internal Revenue Code. However, before proceeding under this section, which may be timely done in this case, we wish to advise this Court of the action which the defendant proposes to take under the new Internal Revenue Code and which action will render this cause moot.

Wherefore, it is prayed that this motion be granted.

Dated: This 11th day of February, 1955.

LLOYD H. BURKE,  
United States Attorney

/s/ By CHARLES ELMER COLLETT,  
Asst. United States Attorney

/s/ WAYNE L. PRIM,  
Attorney, Office of Regional Counsel, Internal Revenue Service.

Acknowledgment of Service attached.

[Endorsed]: Filed February 12, 1955.

[Title of District Court and Cause.]

### MEMORANDUM AND ORDER

Defendant moves for reconsideration of this Court's order of February 2, 1955. That order granted plaintiff an injunction restraining the assessment and collection of income taxes alleged to be due the United States.

The amount alleged to be due the United States is small, and no doubt the defendant would like to avoid the procedure of issuing a ninety day letter (which is likely to be followed by the taxpayer filing a petition with the Tax Court). Defendant's first attempt to avoid issuing a notice of deficiency was to send plaintiff a Notice of Mathematical Error. In case of mathematical error the taxpayer has no right to petition the Tax Court, and the Director of Internal Revenue is under no obligation to wait ninety days before making an assessment. But the error which defendant alleges plaintiff made is not a mathematical error at all, as discussed in this Court's order of February 2, 1955.

Defendant now seeks to avoid issuing a ninety day letter by arguing that no deficiency exists. This argument is based on the fact that the only controversy between plaintiff and defendant is whether it was proper for plaintiff to take a credit for an overpayment of tax made in a previous year. Defendant contends that no deficiency resulted from plaintiff taking this credit, if it was erroneously taken, because 26 U.S.C.A. §271(b)(1) directs that payments on account of estimated tax should not



be considered in the computation of the proper tax. That section provides in part:

“The tax imposed by this chapter and the tax shown on the return shall both be determined without regard to payments on account of estimated tax \* \* \*”

In the opinion of this Court the quoted words have reference to payments made on account of tax for the tax year in question, and they do not refer to credits taken for overpayments made on account of estimated tax in prior years. The credit taken by plaintiff here was not for a payment on account of estimated tax for the year in question, but was a credit for an overpayment made several years before. Therefore the dispute between the parties is whether the plaintiff correctly took a credit in computing the amount due the Government in the year in question; the parties are not in dispute as to whether payments were made on account of tax admittedly owing to the Government.

Even under the construction of Section 271(b) (1) urged upon this Court by defendant, there would be a deficiency because plaintiff did in fact take the credit in computing her tax. If such action was erroneous under Section 271(b)(1), then a deficiency exists.

Defendant contends that there is no deficiency because plaintiff admits that she incurred a certain amount of tax liability in the year in question; this contention is refuted in Appeals of Moir, et al., 3 B.T.A. 21, 22:

“\* \* \* in cases in which the taxpayer shows an amount of tax upon his return but does not admit that that amount of tax is due and collectible, it is the amount which he admits to be due and not the amount which appears upon the face of the return which is deemed the starting point in the computation of a deficiency.” (Citation omitted.)

It is immaterial that the defendant has refused to use the term “deficiency” in his notice to plaintiff. In *Moore vs. Cleveland Ry. Co.*, 6th Cir., 108 F.2d 656, 659, the Court said:

“It would seem, therefore, that whenever the taxpayer has failed to make adequate return of income, there is a deficiency, notwithstanding lack of determination by the Commissioner or his agents.”

In *Maxwell vs. Campbell*, 5th Cir., 205 F.2d 461, the Government took a position similar to the position of defendant here; that is, the Government contended that certain assessments that had been made were not deficiency assessments. The court there held that the assessments were deficiency assessments, and that the taxpayer was entitled to an injunction because no ninety day letter had been sent. See also *Hastings & Co. vs. Smith*, E.D. Pa., 122 F.Supp. 604, 608-609, to the same effect.

In short, defendant by evasive and ambiguous action is seeking to avoid giving the taxpayer the opportunity to test the correctness of her claimed credit in the Tax Court. The patently spurious claim of mathematical error is indicative of an intention to frustrate rather than promote the pur-

pose of the internal revenue laws to give the taxpayer his day in court. The present claim of no deficiency is equally spurious. The precise purpose of the injunctive power given the courts under 26 U.S.C.A. 272(a) is to prevent arbitrary action on the part of the tax collecting authorities of the type and character here shown.

This Court does not express any opinion as to the validity of plaintiff's action in taking the disputed credit; as stated in this Court's order of February 2, 1955, the purpose of the injunction provided for by Section 272(a) is to permit the determination of such questions to be made by the Tax Court.

Defendant has stated an intention to proceed under the Internal Revenue Act of 1954. Such action has not yet been taken, and therefore the propriety of such action, if it were taken, is not before this Court. Accordingly no opinion is expressed as to the validity of action contemplated by defendant under the 1954 Act.

It Is Ordered that the motion of defendant for reconsideration of this Court's order of February 2, 1955, be, and the same is hereby denied.

Dated: April 18, 1955.

/s/ OLIVER J. CARTER,  
United States District Judge

[Endorsed]: Filed April 18, 1955.



[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the United States, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the memorandum and order entered on February 2, 1955 and filed of record on February 4, 1955 wherein this Court ordered that the motion of the plaintiff (above named) for summary judgment be granted; that a certain assessment be removed from the assessment list and that defendant, its agents, servants and employees be enjoined from collecting from plaintiff by distraint; and, from the memorandum and order entered and filed of record on April 18, 1955 wherein the motion of the defendant for reconsideration or rehearing of the memorandum and order of February 2, 1955, which motion was timely filed pursuant to Rule 59 of the Federal Rules of Civil Procedure, was denied.

LLOYD H. BURKE,  
United States Attorney

/s/ By CHARLES ELMER COLLETT,  
Asst. United States Attorney

/s/ ALONZO W. WATSON, JR.,  
Attorney, Office of Regional Counsel, Internal Revenue Service.

[Endorsed]: Filed June 16, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 33161

MARIA REPETTI, Plaintiff,

vs.

GLEN T. JAMISON, Director of Internal Revenue, Defendant.

### JUDGMENT

The motion of the plaintiff, Maria Repetti, for summary judgment and the motion of the defendant, Glen T. Jamison, for summary judgment having come on for hearing on November 29, 1954, and the Court at that time having granted the oral motions of the parties for permission to submit their respective motion for summary judgment on briefs, and the parties having duly filed briefs in support of their motions for summary judgment; the Court having fully considered such briefs and having entered, on February 2, 1955, a memorandum and order granting the plaintiff's motion for summary judgment.

It Is Hereby Ordered, Adjudged and Decreed:

1. That the motion of the plaintiff, Maria Repetti be, and hereby is granted.
2. That the assessment of the defendant, Glen T. Jamison, against the plaintiff, Maria Repetti, dated January 30, 1953 be removed from the assessment list.
3. That the defendant, Glen T. Jamison, his

agents, servants and employees be, and hereby are, enjoined from taking any action to distrain plaintiff's property pursuant to the assessment of January 30, 1953.

It further appearing that, thereafter and within the period of ten days prescribed by Rule 59 of the Federal Rules of Civil Procedure, the defendant, Glen T. Jamison, filed a motion for rehearing or reconsideration of the Court's order of February 2, 1954, and the parties having filed a stipulation to submit such motion on briefs, supporting briefs having been duly submitted, the Court having fully considered such brief and having entered a memorandum and order denying the defendant's motion for reconsideration or rehearing.

It Is Hereby Ordered, Adjudged and Decreed:

That the motion of defendant for reconsideration of this Court's order of February 2, 1955 be, and hereby is denied.

/s/ OLIVER J. CARTER,  
United States District Judge

Approved as to form, as provided in Rule 21, General Rules of Practice, District Court of the United States, Northern District of California.

SEAMAN & DICK,  
/s/ By WAREHAM C. SEAMAN,  
Attorneys for Plaintiff,  
Maria Repetti

[Endorsed]: Filed June 21, 1955.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Glen T. Jamison, the defendant above-named, hereby appeals to the Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled action on June 21, 1955.

LLOYD H. BURKE,

United States Attorney

/s/ By CHARLES ELMER COLLETT,

Asst. United States Attorney

/s/ ALONZO W. WATSON, JR.,

Attorney, Office of Regional Counsel, Internal Revenue Service.

[Endorsed]: Filed June 24, 1955.

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[Title of District Court and Cause.]

### DOCKET ENTRIES

1953

Nov. 5—1. Filed complaint—issued summons.

Nov. 5—2. Filed order show cause returnable  
Nov. 13, 1953 at 10 a.m. (Goodman).

Nov. 13—Ord. cont'd to Nov. 24, 1953, on consent of  
counsel. (Goodman)

Nov. 20—3. Filed summons, executed as to DA &  
AG, Nov. 12, 1953; as to Jamison Nov. 6,  
1953.

Nov. 20—4. Filed cert. copy order show cause, ex-  
ecuted same as summons.

1953

Nov. 24—Hearing on order to show cause. Arguments heard and application for injunction denied without prejudice. (Goodman)

1954

Jan. 8—5. Filed stip. ext. time for deft. to plead to Feb. 11, 1954.

Feb. 26—6. Filed notice & motion by deft. to dismiss, March 8, 1954.

Feb. 26—7. Filed memo. of deft. in support of motion to dismiss.

Mar. 8—Ord. motion to dismiss. cont'd. to April 5, 1954. (Roche)

Apr. 5—8. Filed brief of plaintiff in opposition to motion to dismiss.

Apr. 5—Ord. after hearing motion to dismiss. subm. (Harris)

Apr. 7—9. Filed order denying motion of defendant to dismiss, without prejudice. (Harris)

Apr. 8—Mailed copies order to counsel.

July 29—10. Filed answer of the U. S.

Nov. 19—11. Filed notice by plaintiff of motion for summary judgment, Nov. 29, 1954, with affidavit.

Nov. 24—12. Filed notice and motion by defendant for summary judgment, Nov. 29, 1954.

Nov. 29—Ord. after hearing memos. to be filed 15-15-10 days and motion for summary judgment con'td. to Jan. 14, 1955 for subm. (Carter)

1954

Dec. 13—13. Filed memo. of plaintiff in support of motion for summary judgment.

Dec. 29—14. Filed memo. of deft. in support of motion for summary judgment.

1955

Jan. 6—15. Filed reply brief of plaintiff in support of motion for summary judgment.

Jan. 14—Ord. case subm. (Goodman for Carter)

Feb. 4—16. Filed memo. order of court motion of plaintiff Maria Repetti for summary judgment granted and assessment of Jan. 30, 1953 ordered removed from assessment lists. Defts. enjoined from taking action to distrain plaintiff's property pursuant to said assessment. (Carter)

Feb. 12—17. Filed notice by deft. of motion for rehearing motion for summary judgment, Feb. 21, 1955 before Judge Carter.

Feb. 17—18. Filed stip. that motion for rehearing be submitted on briefs seriatim or concurrently as directed by Court.

Feb. 21—Ord. case cont'd. to March 11, 1955 for subm. (Carter)

Mar. 2—19. Filed memo. of plaintiff in opposition to motion for rehearing.

Mar. 10—20. Filed memo. of deft. in support of motion for reconsideration and rehearing.

Mar. 11—Ord. case subm. (Carter)

Apr. 18—21. Filed memo. and ord. of court. (Motion for reconsideration of order of Court, Feb. 2, 1955, denied.) (Carter)



1955

Apr. 19—Mailed copies order to counsel.

Jun. 16—22. Filed notice of appeal by deft.

Jun. 21—23. Filed judgment—entered June 21, 1955—motion of plaintiff for summary judgment granted and assessment vs. plaintiff dated Jan. 30, 1954, removed from assessment list. Motion of defendant for reconsideration denied. (Carter)

Jun. 21—Mailed notices.

Jun. 24—24. Filed notice of appeal by defendant.

Jun. 24—25. Filed appellant's designation of record on appeal.

Jun. 27—Mailed notices.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, or true and correct copies of the docket entries, in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for injunctive relief.

Order to show cause.

Motion to dismiss and notice.

Order denying motion to dismiss.

Answer of the United States.

Notice of motion for summary judgment with

motion and affidavit in support attached (Defendant's).

Notice of motion for summary judgment with motion and affidavit in support attached (Plaintiffs).

Memorandum and Order filed Feb. 4, 1955.

Notice of motion for rehearing with motion attached.

Memorandum and Order filed April 18, 1955.

Notice of appeal filed June 16, 1955.

Judgment.

Notice of appeal filed June 24, 1955.

Designation of record on appeal.

Docket entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 19th day of July, 1955.

[Seal] C. W. CALBREATH, Clerk  
/s/ By WM. C. ROBB, Deputy Clerk

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[Endorsed]: No. 14825. United States Court of Appeals for the Ninth Circuit. Glen T. Jamison, Director of Internal Revenue, Appellant, vs. Maria Repetti, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 19, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14825

GLEN T. JAMISON, District Director of Internal  
Revenue, Appellant,

vs.

MARIA REPETTI, Appellee.

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit the Appellant, Glen T. Jamison, hereby files the following statement of points on which he intends to rely:

1. The District Court erred in granting the Plaintiff-Appellee's Motion for Summary Judgment.

2. The District Court erred in denying the Defendant-Appellant's Motion for Summary Judgment.

3. The District Court erred in denying the Defendant-Appellant's Motion for Reconsideration or Rehearing.

4. The District Court erred in ordering the assessment, dated January 30, 1953, made by the Defendant-Appellant against the Plaintiff-Appellee, be removed from the assessment list.

5. The District Court erred in ordering that the

Defendant-Appellant, his agents, servants and employees be enjoined from taking any action to distrain Plaintiff-Appellee's property pursuant to the assessment of January 30, 1953.

Dated: July 29, 1955.

LLOYD H. BURKE,  
United States Attorney

/s/ By CHARLES ELMER COLLETT,  
Asst. United States Attorney

/s/ ALONZO W. WATSON, JR.,  
Attorney, Office of Regional Counsel, Internal Revenue Service.

[Endorsed]: Filed Aug. 3, 1955. Paul P. O'Brien,  
Clerk.